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No. 91-453

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

-DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether the 1990 amendments render petitioner's permanent takings claim not ripe and, because the parties specifically reserved any temporary takings claim for later consideration by the state courts, whether petitioner's temporary takings claim is not ripe for this Court's review.

2. Whether a state law barring the construction of permanent structures on properties adjacent to the shoreline and historically subject to severe episodic erosion constitutes an unconstitutional taking of private property solely because of the property's diminution in market value.

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT

1. Petitioner, David H. Lucas, purchased two vacant oceanfront lots in the Beachwood East Subdivision of the Wild Dunes development on the Isle of Palms, Charleston County, South Carolina, in December 1986. Petitioner had been intimately associated with that development since 1979, having served as a contractor, a realtor and in the position of assisting the board of Wild Dunes with planning. Tr. 24; 33-34. During that time period, prior to petitioner's purchase, the property suffered from severe episodic erosion. The erosion problems between 1981 and 1983 were so serious that the Mayor of the locality issued twelve emergency orders, under the auspices of respondent South Carolina Coastal Council, for sand scraping and sand bagging to protect man-made structures on lots in the immediate vicinity of petitioner's property. Tr. 99. Respondent itself issued its own emergency sand scraping order in 1983, along with an erosion

control permit to construct an 850 foot rock revetment immediately west of petitioner's lots and a 1,300 foot rock revetment to the east of the property. Tr. 100-101. That structure is the longest revetment for which respondent has ever issued an erosion control permit. Tr. 101.

These serious erosion problems were consistent with the fragile nature of the barrier island within which petitioner's property is located. Isle of Palms has long been dominated by significant fluctuations in the shoreline. Tr. 72-88. As a result, since the time that beachfront construction in Wild Dunes began in the late 1970's, homes and other man-made structures have been seriously threatened by erosion. Tr. 74, 75, 99; 103-104.

2. Approximately 19 months after petitioner's purchase, the South Carolina legislature amended the 1977 Coastal Zone Management Act by enacting the 1988 Beachfront Management Act. The purpose of the Act was primarily to prevent construction in the fragile beach/dune system that endangers life and property and that directly damages the system itself (which in turn affects recreation, the tourist economy, aesthetics and habitat). Section 1 and Section 2 of the 1988 Beachfront Management Act are now codified as § 48-39-250 and § 48-39-260, Pet. App. 97-104. These purposes were to be implemented by developing a setback scheme, S.C. Code Ann. § 48-39-280 (1988 Supp.), regulating reconstruction of man-made structures, S.C. Code Ann. § 48-39-290 (1988 Supp.), and regulating new construction, S.C. Code Ann. § 48-39-300 (1988 Supp.).

Pursuant to the 1988 Act, respondent, South Carolina Coastal Council, surveyed the entire coastline of the state to effectuate the Act's "forty year retreat policy." S.C. Code Ann. § 48-39-280(A) (1988 Supp.) The purpose of this survey was to determine the location of a baseline parallel to the shoreline for each "standard erosion zone" and each "inlet erosion zone" in order to identify those properties most vulnerable to erosion from the sea. *Id.* Once the baseline was located, a no construction line was established twenty feet landward. Landward still of this line a setback line was established at a point forty times the average annual erosion

rate, but no closer to the baseline than twenty feet, based upon the best historical and scientific data adopted by the Council. S.C. Code Ann. § 48-39-280(B)(1) (1988 Supp.). Significant restrictions on construction applied to land seaward of either line, but the more significant restrictions applied to land seaward of the twenty foot no construction line. § 48-39-290 and 300 (1988 Supp.).

Respondent's location of the baseline seaward of petitioner's lots was based on historical evidence of significant episodes of erosion in the area during the last forty years. Tr. 13, Stipulation 14. In particular, respondent found that while the east end of Isle of Palms has generally been accretional, it has been subject to serious erosion during the past forty years. The shoreline has been landward of petitioner's seaward property line fifty percent of the time since 1949. Tr. 84. Further, the shoreline has been landward of the road behind petitioner's property between fifteen and twenty percent of the time. Tr. 84. Petitioner's two lots were entirely under water as recently as 1963 and, in 1973, a pond formed over a portion of the lots. Tr. 78-84. Even though the severe erosion episodes are themselves temporary in nature, the shoreline in their aftermath can remain in place for several years. Tr. 95-96, Exhibits 10-22.

Pursuant to this historical evidence the baseline was located landward of the two lots in question. This is important because the 1988 Act prohibited new construction of habitable structures seaward of the twenty foot no construction line. S.C. Code Ann. § 48-39-300 (1988 Supp.). Thus, petitioner could not build his proposed homes.

3. Petitioner did not challenge respondent's location of the baseline landward on his property. Under the Beachfront Management Act, petitioner was entitled to seek formal administrative, followed by judicial, review of the location of the baseline, setback line, or erosion rate, if he believed that any of the three was adopted in error. S.C. Code Ann. § 48-39-280(E) (1988 Supp.). Petitioner instead brought this collateral takings challenge in the circuit court.

Petitioner's sole claim at trial was that the Act equated to an unconstitutional permanent taking based on the severity of

its economic impact on the market value of his property.[1] He did not challenge nor ask the Court to consider the reasonableness or the validity of the Act, but relied instead solely upon the alleged loss of use and diminution in value of his property as the justification for his taking claim. At trial, petitioner offered testimony that the highest and best use of the property was for the construction of single-family homes. Tr. 48-49. Based upon his inability to develop the lots as single-family residential, petitioner's expert concluded that the lots had no value. Tr. 49. Petitioner offered no testimony concerning his inability to use the lots for purposes other than single-family construction, his attempt to sell the properties, or that the lots had no value for any other uses after passage of the Act. Nor did he offer any evidence to show the property was suitable in its natural state for development, other than to stipulate to the fact that houses have been built on nearby lots.

The Permit Administrator for the Coastal Council testified that the Act did not prevent construction of temporary structures, nor prohibit recreational or other uses of the property. Tr. 98. Respondent's appraiser testified that there is value left in the lots based upon what another person or an adjacent property owner would pay for the lots. Tr. 115-117. Pursuant to a pre-trial stipulation, neither petitioner nor respondent addressed the distinct issue of whether the 1988 Act amounted to a temporary taking of petitioner's property. Tr. 14, Stip. 16.

4. The trial court concluded that the Act amounted to an unconstitutional permanent taking of petitioner's property. Pet. App. 36-41. The court awarded damages to respondent in the amount of $1,232,387.50, which was the court's assessment of the sum of the property's market value prior to the law's enactment, the real property taxes paid since, and the simple interest on the mortgage balance. Pet. App. 40. The

[1] Petitioner's complaint claimed more wide-ranging allegations, but they were not pursued at trial or on appeal. See Pet. App. 154-155.

court further ordered that, "upon satisfaction of the judgment [petitioner] . . . tender deeds to [the property] to the State of South Carolina." Pet. App. 41.

5. On June 25, 1990, while this case was on appeal to the South Carolina Supreme Court, the South Carolina Legislature amended the 1988 Beachfront Management Act. Those amendments, in pertinent part, allow a coastal property owner to apply for a "special permit" to construct habitable structures seaward of the baseline, notwithstanding the prior ban on such construction. S.C. Code Ann. § 48-39-290(D) (1990 Supp.).[2] Respondent accordingly petitioned the state supreme court to consider the impact of § 48-39-290(D) on the petitioner's claim that there had been a total taking. (Respondent's Motion dated August 1, 1990). The court denied petitioner's request on the grounds that the Court Rules did not allow for the relief sought. (August 1990 letter from Deputy Clerk)

6. On the merits, the South Carolina Supreme Court reversed the decision of the circuit court. Pet. App. 1.

The court opined that petitioner erroneously relied upon the legal position that he had lost "all economically viable use" of his property and this factor alone entitled him to compensation under the Fifth Amendment. Pet. App. 12. Reviewing the current factors applied by the United States Supreme Court in analyzing "takings" cases, the court concluded that because Lucas failed to challenge the purpose of the 1988 Act and indeed conceded the importance and validity of the Act, his claim failed. Pet. App at 8-12. After listing the purposes and findings, the court stated that it was "in no position to, *sua sponte* take issue with the legislative findings." The court rejected his theory that "in *all* cases when all economically viable use is extinguished by regulation, compensation is due." Pet. App. 12.

[2] Respondent has adopted regulations to implement these special permit procedures. (See S.C. Ann., R.30-15(F) (1990).) To date petitioner has not applied for a special permit or otherwise availed himself of the opportunity to develop his lots as allowed under the Act, as amended in 1990.

SUMMARY OF ARGUMENT

1. Petitioner's taking claim is not ripe because § 48-30-290(D) of the 1990 Amendments to the 1988 Beachfront Management Act now allows petitioner the opportunity to apply for a permit to construct homes seaward of the baseline. Pet. App. 125. Given the existence of this remedy, petitioner's claim that the respondent has permanently taken his property is not ripe for review until and unless he applies for and is denied such a special permit. The issue of temporary takings, which was preserved at trial by stipulation, likewise is not ripe.

2. Should this Court nonetheless conclude that petitioner's taking claim presents a justiciable case and controversy, the Court should reject the petitioner's extreme position that he is entitled to compensation based solely upon diminution in value. Such a test flies squarely in the face of all the Court's takings jurisprudence. This Court has repeatedly rejected the claim that diminution in value, standing alone, determines whether an unconstitutional taking has occurred. The Court has instead made clear that in addition to economic impact, both the character of the government action at issue, and the reasonableness of the investment-backed expectations implicated must be considered. Indeed, special consideration must be given to the character and purpose of the state interest because at a minimum there is current agreement among members of the Court that there is a class of government actions effectively insulated from the requirement of compensation because they merely prevent harmful uses of property. Likewise, reasonableness of the investment-backed expectations of the landowner can have a significant impact upon the Court's determination of whether a compensable taking has occurred.

3. Finally, assuming this Court does not confine its review to the petitioner's untenable "bright line" economic impact test, the South Carolina Supreme Court's judgment should be upheld based upon the three factors cited as central to the takings formula. These factors include the character of the government action, the interference with reasonable

investment-backed expectations, and the economic impact of the regulations.

As it relates to the character of the government action, the 1988 Beachfront Management Act was passed in response to serious public harm created by "ill-planned" development that has been built ever closer to the dangers of erosion and storms. Pursuant to direction by the federal government, South Carolina implemented a setback scheme to prevent construction in the fragile beach/dune system. This prohibition took into account the danger to life and property not only to those building, but also to nearby neighbors. There is no question that the barrier island that the petitioner seeks to build upon is hazardous and that such construction could interfere with an already delicate environment. In this respect, the land use restriction petitioner challenges is analogous to common law tort doctrine that limits a property owner from using his property in a way that, because of the property's physical characteristics, causes physical harm to other persons and property.

As it relates to the petitioner's reasonable investment-backed expectations, several factors militate against a conclusion that the expectation to build homes on these lots is reasonable. First, and as mentioned above, such construction creates a serious threat to health and safety. No one can have a reasonable expectation to harm others in such a manner. Second, in the area of cases dealing with government largess and economic property, this Court has recognized that despite significant losses to property holders, no compensable taking occurs simply because regulations upset settled expectations. There seems no justification for treating petitioner's expectations differently simply because they involve real property. Third, the petitioner had no reasonable expectation to construct upon this volatile and fragile environment. There has developed a strong legal tradition that recognizes that no one has a right or an expectation to change the natural character of certain types of land or to use such land for a purpose for which it is unsuited in its natural state. This principle applies to the shifting sands of Isle of Palms, where the petitioner's lots have historically proven unfit for construction. Finally,

these legal principles concerning expectation are also supported by the fact that petitioner was intimately involved with the development of the Wild Dunes subdivision. He knew of the dangers and should have expected the government to act in a responsible way by implementing setbacks that prevent ill-planned development.

Lastly, petitioner is not deprived of all his economic value or use of his property. His whole case is centered on the sole proposition that he had been denied "highest and best" use of his property to construct single-family homes. No effort was made to assign value to other uses. Indeed, he retains significant value in his bundle of property rights. Given that the property is unsuitable for what he deems "highest and best" use, what he retains is an appropriate and reasonable use of his property.

I. PETITIONER'S TAKINGS CLAIM, INCLUDING ANY CLAIM BASED ON AN ALLEGED TEMPORARY TAKING OF HIS PROPERTY, IS NOT RIPE FOR ADJUDICATION IN LIGHT OF THE 1990 AMENDMENTS TO THE ACT

As the Solicitor General correctly notes (U.S. Amicus Br. 8-10), the 1990 amendments to the Beachfront Management Act have deprived this case of the requisite ripeness and therefore rendered it unsuitable for the Court's review. Petitioner can no longer claim a permanent taking without first seeking relief under the 1990 law. In addition, any possible remaining temporary takings claim was specifically reserved in the courts below, which should be allowed to address such a claim in the first instance.

1. This Court has consistently held that a land use challenge is not ripe where the property owner has failed to apply for a variance or to seek a determination of whether a permit would be issued by the regulating agency. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions."); *San Diego Gas & Electric Co. v. City of San Diego*,

450 U.S. 621, 633 (1981) ("further proceedings are necessary to resolve the federal question whether there has been a taking at all."); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190 (1985) ("[R]espondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine takings claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause."); *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340, 348-351 (1986) ("Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.")

Established precedents of the Court further demonstrate that lack of the requisite ripeness is a key jurisprudential threshold requirement. (Wright, Miller & Cooper, Federal Practice and Procedure, § 3532.3 (1984 & 1991 Supp.) Accordingly, the ripeness requirement can and must be considered at the appellate level as well as in the trial court. (*Williamson County; MacDonald, Sommer and Frates.*)

This Court should not consider this case unless and until petitioner first avails himself of a plainly feasible opportunity to obtain a "special permit" under § 48-39-290(D) of the 1990 Act and S.C. Code Ann. (1990) § R.30-15(F) of respondent's implementing regulations.[3] While an opportunity to obtain such a "variance" from the Act's setback requirements was arguably not previously available to him,[4] the 1990

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[3] Respondent previously petitioned the South Carolina Supreme Court prior to issuance of the opinion for consideration of the impact this section had on the permanent takings claim. That petition was denied. (See argument at p. 5, *supra*.) The dissent called for a remand to the respondent prior to award of damages to see if a special permit would be issued in *Lucas*. App. 30-31.

[4] Arguably, such a procedural opportunity existed even under the pre-existing version of the Act. (See Respondent's S.C. Supreme Court brief on this issue at p. 41) S.C. Code Ann. Section 48-39-180, which was originally enacted in 1977, survived the 1988 amendments to the Act and remains in the

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amendments provide petitioner a clear administrative avenue of relief. Yet petitioner has assiduously avoided pursuing this option. He has filed no application, and to this day has failed to give respondent an opportunity to consider petitioner's development proposal. Conversely, respondent has been deprived of the ability to determine whether and how residential development of the type contemplated by petitioner is consistent with state law. Under these circumstances, it is simply impossible to gauge petitioner's claim that the Act has worked a permanent taking of his property. The present case thus falls squarely within the Court's past precedents on the ripeness issue, and a dismissal or remand on that ground is required.

2. Petitioner argues that notwithstanding the effect of the 1990 amendments, he has suffered a "temporary taking" for which compensation is required. Hence, he argues, the case remains ripe for adjudication on the merits. (Petitioner's Brief on the Merits at 27-28, n.5.) Petitioner cites this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), in support of this novel argument. Petitioner's reliance on *First English* is misplaced. First, petitioner's argument is simply not responsive to the fact that his *permanent* takings claim is not ripe. As this Court observed in *First English*, "the landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking." *First English* at 317.

Turning specifically to the "temporary takings" issue, the Solicitor General correctly observes – while petitioner overlooks – that "the quite distinct issue of a temporary taking was not addressed by either court below." U.S. Amicus Brief

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statute's current version, provides in pertinent part that a permit applicant whose application has been denied may seek a *de novo* judicial hearing to determine whether that permit decision results in a taking. If the court responds in the affirmative, "*it shall enter a finding that the action shall not apply to the land of the plaintiff*, or in the alternative, that the Council shall pay reasonable compensation for the loss of use of the land." *Id. (Emphasis added.)*

at 11. Contrary to petitioner's representations to this Court, the issues of whether and to what extent petitioner has incurred a temporary taking under the Takings Clause have simply never been addressed. The parties stipulated below that respondent reserved the right, as to temporary damages, to argue that no permit had been applied for by petitioner. Tr. 14, Stip. 16. Petitioner further acknowledged that no permits had been obtained from the Wild Dunes Board, the City of Isle of Palms, or respondent, and that no effort had been made to seek a vested right for the proposed structures. Additionally, petitioner has never challenged the location of the setback or baseline on the property. Tr. 39-40.

Respondent further agrees with the Solicitor General's position that the state court system should be afforded the initial opportunity to address the issue of whether and to what extent a temporary taking of petitioner's property occurred during 1988-1990. Principles of comity and cooperative federalism dictate that a remand for that purpose be ordered, if this Court views the temporary takings claim as viable. This disposition is particularly compelling in light of petitioner's failure to date to address all relevant aspects of takings analysis (see argument at p. 12, *infra*); the significant threshold barriers to petitioner's claim of a temporary taking;[5] and the dearth of relevant evidence in the record on those threshold factual issues.[6]

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[5] For example, "mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' " *Agins v. City of Tiburon*, 447 U.S. 255, 263 n. 9 (1980), citing *Danforth v. United States*, 308 U.S. 271, 285 (1939); also see *First English*, 482 U.S. at 318. Secondly, the Court has stated that interim damages are due only "where the government's activities have already worked a taking *of all use* of property, (such that) no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. (*First English*, 482 U.S. at 322.)

[6] Not only did petitioner fail to present evidence that he was prepared to build in 1988 (thus providing a basis for fair rental analysis), he also failed to offer any evidence as to when such construction would have been completed.

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Thus, the issue of interim damages is not ripe for review and any consideration of the takings issue at this juncture would be improper. The appropriate course is, instead, either to dismiss the writ as improvidently granted or, alternatively, to remand the case to the state courts to determine: a) the effect on petitioner's takings claim of the 1990 amendments; and b) the extent to which petitioner has suffered a temporary taking under the principles set forth in *First English* and related precedents.

II. THE SOUTH CAROLINA SUPREME COURT CORRECTLY REJECTED PETITIONER'S CLAIM THAT A STATE LAW BARRING CONSTRUCTION OF PERMANENT STRUCTURES ON PROPERTIES ADJACENT TO THE SHORELINE CONSTITUTES A TAKING OF PRIVATE PROPERTY SOLELY BECAUSE OF THE PROPERTY'S DIMINUTION IN MARKET VALUE.

Petitioner's takings claim rests, at bottom, on the following proposition: a state police power measure that prohibits a landowner from constructing a permanent structure on his land necessarily constitutes a taking of private property requiring the payment of just compensation under the Fifth Amendment's Takings Clause. This must be so, petitioner contends, because of the severe economic impact that such a restriction has on the market value of the property. Petitioner's contention is fatally flawed from the outset. This Court has never embraced such an extreme view, but has instead repeatedly stressed that several factors, including the government's reasons ("the character of the government

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Logically, only upon completion of construction would petitioner have been entitled to compensation, assuming a temporary taking to have transpired. Nor was any evidence introduced to show that all use of the subject property was lost between 1988 and 1990. In fact, no evidence was presented to show *any* use was lost except the right to build. Respondent is unaware of any case which has to date awarded damages for a temporary taking based on such a dearth of relevant evidence or in the face of such a speculative scenario.

action"), are of critical concern to takings analysis. Where, moreover, as in this case, the restriction on development is necessary to prevent serious injury to public health and safety and substantial physical harm to nearby properties, no taking has resulted. This Court's decisions, as well as settled state law property and tort doctrine, make plain that in such circumstances the government cannot be deemed to have "taken" private property in contravention of the Takings Clause.

Because, moreover, the validity of petitioner's contrary view was the sole issue before the South Carolina Supreme Court, the judgment of that court should be affirmed. There is no need to define the precise scope of those police power measures that can justify the severest of economic impacts. Nor, more particularly, need the Court determine whether the restriction challenged here, in fact, falls within the contours of it, however precisely defined. This is because petitioner has effectively conceded that it does for the purpose of this litigation.

A. The Only Issue Before This Court Is The Validity Of Petitioner's Contention, Rejected By The State Supreme Court, That Whether A State's Restriction On The Use Of Property Amounts To A Taking Depends Exclusively On Its Economic Impact.

Petitioner maintained throughout the litigation in the courts below that the reasons for the governmental restriction on the use of his property are wholly irrelevant to the question of whether that restriction amounts to an unconstitutional taking of private property. According to petitioner, the economic impact is independently determinative of the takings inquiry. The validity of that contention is therefore the only issue properly before this Court.

1. At trial, petitioner never questioned the urgency of, and precise reasons for the prohibition on permanent construction seaward of that baseline; nor did he offer any alternative management methods the State could use short of prohibition. Petitioner chose instead to base his takings claim on the narrow view that any such inquiry as to urgency was irrelevant so long as petitioner could establish the severity of

the economic impact. Petitioner, accordingly, introduced evidence at trial that was, for all practical purposes, confined to the issue of the degree of the economic impact. See Tr. 19-80.

Indeed, during respondent's presentation of witnesses, petitioner sought to prevent respondent from introducing evidence regarding the public harm that would be caused by construction on petitioner's property. According to petitioner, none of that evidence was "relevant material". Trial Tr. 94-95.[7]

In particular, petitioner objected to respondent's introduction of evidence regarding the "dilatorious [sic] effects in terms of erosion by construction of habitable structures along the beach front" and to whether, apart from a prohibition on permanent structures, the government had alternative methods available for dealing with the erosion problem. Trial Tr. 94. Respondent argued that such testimony did not have "anything to do with issues outlined in the case." Trial Tr. 94-95. And in response to respondent's claim that such evidence was relevant to the "balancing process," that is whether "the harm against which we're protecting is so significant . . . that we don't have to pay money" (Trial Tr. 95), petitioner claimed that no such balancing was called for by the Constitution. Trial Tr. 97.[8]

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[7] This is clearly set out in the full circuit court *Trial* transcript. See Trial Transcript, 94-97.

[8] Most of the exchange between petitioner and respondent is reproduced here in full (Mr. Harness is counsel for respondent; Mr. Howe and Mr. Smith are counsel for petitioner):

Q: (Mr. Harness):

Can there be dilatorious [sic] effects in terms of erosion by construction of habitable structures along the beach front?

A: (Witness):

I think there can, depending on the nature of the construction itself.

Q: All right sir. Now, in terms of dealing with erosion from a management standpoint, what are the alternatives that you have in order to deal with the problem?

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The trial court, for that matter, allowed respondent to introduce its evidence, but only on the condition that it "won't take too long." Trial Tr. 97. In subsequently ruling in petitioner's favor, the trial court focused on the economic impact

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A: I have also . . .

Mr. HOWE: Your honor, excuse me. We have been sort of waiting for Mr. Harness to move into some relevant material. We really don't think it's relevant. We find it interesting but I don't think it has anything to do with issues outlined in the case. We object to it on – to all the testimony on the grounds of relevance. Mr. HARNESS: Your honor, if I might for a moment, . . . Mr. HOWE: Let me take that a step further. If he can show a public interest in the regulation – we've never contended there wasn't a public interest in the regulation. We just contend they've got to pay for it like any other public interest in regulation.

So if he's trying to show a basis for why they passed the Act, we haven't raised an issue with the Act. We haven't raised an issue as to its validity; only the price tag associated with it.

Mr. HARNESS: Your Honor, if I might . . .

THE COURT: I don't believe he's arguing about the Act in itself.

Mr. HARNESS: No, sir. What I'm arguing about really is the balancing process that you have to go through. It's our position that the State needs to show that the harm against which we're protecting is so significant as to balance that decision making process of the Judge in favor of the State; to say that the public interest is so significant that we don't have to pay money. . . .

Mr. SMITH: Your Honor, not to belabor the point, but to the extent Mr. Harness talks about a balancing process between acquisition in our opinion of this gentleman's property to the public interest and some balancing that raises beyond that so they don't have to pay for it, with all due respect, the Constitution of the State of South Carolina has already attained that balancing process, and it says that if private [property] is taken for a public purpose then the landowner has to be paid just compensation.

That's the only real issue in this case.

Trial Tr. 94-97.

of the challenged law, without taking into account either the character of the governmental action or whether petitioner's investment-backed expectations were "reasonable" in nature. Pet. App. 39-40.

2. Petitioner's argument before the South Carolina Supreme Court was no different. He supported his takings claim solely in terms of the state law's economic impact on petitioner's property. Petitioner's brief in the state supreme court accordingly argued that "[t]he focal point in assessing whether a 'taking has occurred' is the effect that the governmental action has on the property." Resp. Br. S.C. Sup. Ct. 2. Petitioner further allowed for no occasion under which the purpose of a police power measure might justify an especially severe economic impact: "The argument that public policy can dictate this result is simply amiss." *Id.* at 5. Based on the briefs and oral argument, the South Carolina Supreme Court understood petitioner to be advancing just such a narrow and extreme contention. According to the court, petitioner's position was that if a police power measure deprives him of the economic value of his property, "he must be compensated for it even if the regulation depriving him of such is a use-restriction regulation enacted to prevent serious public harm. Pet. App. 3. The court correctly concluded that petitioner's concession of the validity of the purposes of the Beachfront Management Act necessarily extended to the legislative findings within it. Those findings detailed the serious public harm, including physical injury to human life and to adjoining properties that the Act's restrictions on development were intended to prevent:

> Lucas concedes that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm. Pet. App. 8.

The sole issue before the South Carolina Supreme Court, therefore, was the validity of the extreme view that the

character of the government's action was irrelevant, once a moratorium on permanent construction was established.[9] The court below had no occasion to consider in detail, nor did respondent have any need to establish, the precise ways in which the restriction would prevent serious public injury. At no point, except at this late juncture, did the petitioner stray from his position that he was entitled to compensation simply because he could not build houses on his lots.

3. For that reason, moreover, petitioner cannot now legitimately argue that the South Carolina Supreme Court's decision is deficient in this regard. The findings and purposes recognize that threats to life and property and the natural system which further fosters protection of life and property, and other significant state interests can be controlled only by "discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it." S.C. Code Ann. § 48-39-250(6) (1990). He conceded the truth of the findings and policies leaving the respondent only with the responsibility of showing that the property in question is not suitable for the construction that he seeks.

Petitioner likewise cannot avoid that result by pretending, as he now does, that the lower court's decision stands instead for the plainly untenable proposition that no such exacting judicial examination of the character of the governmental action is required even when the plaintiff raises that issue. That is certainly not respondent's position. Nor is that a fair reading of the decision of the state supreme court below.

Indeed, it borders on the disingenuous for petitioner now to argue that the South Carolina Supreme Court "converted a complex inquiry into a bright-line test." Pet. Br. 9. That is instead precisely what *petitioner* sought to do in contending before that court and the trial court that economic impact alone was determinative of the takings inquiry and that no

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[9] See Pet. App. 9 ("Lucas rests on a solitary argument, *viz*, that he is still, despite these concessions, entitled to compensation from the State.").

consideration of the character of the governmental action was necessary.

4. The narrow issue petitioner raised below is likewise the only issue presented by petitioner's petition for a writ of certiorari: "Does a land-use regulation, pursuant to a state's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the value of private property." Pet. i. Consistently, petitioner asks this Court to endorse its proffered rule: "the enforcement of land-use regulations which have the effect of eliminating the value of private property should be *per se* subject to the just compensation requirement of the Fifth Amendment." Pet. Br. 19; see also *Id.* at 28-35.

For the first time in this litigation, however, petitioner has now added an alternative argument to his position. He contends that even if some police power measures may validly severely diminish property's market value, the law challenged here falls outside that category. Pet. Br. 35-45. Because the case was not tried on that basis and because the judgment of the South Carolina Supreme Court was based on a contrary concession by petitioner before that court, petitioner should not be allowed, by changing its position, to obtain this Court's review of an issue not presented to the court whose judgment is under review. Petitioner's "certiorari conversion" is understandable, given the clearly erroneous nature of his extreme view of the Takings Clause. But that is not a substitute for the requirement that the issue be one litigated before the lower courts.

B. In Determining Whether A Police Power Restriction Constitutes A Taking Of Private Property, A Court Must Consider, In Addition To Its Economic Impact On The Property Owner, Both The Character Of The Governmental Action And The Extent To Which It Interferes With Reasonable Investment Backed Expectations, Particularly Where The Purpose Of The Challenged Restriction Is To Prevent Injury To Public Health And Safety And To Protect Other Property From Physical Harm.

Petitioner's "solitary argument" (Pet. App. 9) that "he is entitled to compensation from the State" because of the

economic impact of the Beachfront Management Act, without the need for further inquiry, should be squarely rejected. This Court has repeatedly rejected that very proposition, expressly holding that both the character of the governmental action and the reasonableness of the investment-backed expectations upon which the property owner relies are central to the takings analysis. The Court has, furthermore, long held that police power measures may deprive a property owner of virtually all economic value of property, without constituting an unconstitutional taking, in those instances where the governmental measure prevents serious injury to public health and safety or otherwise bars nuisance-like activity.[10]

1. Contrary to petitioner's submission, this Court has "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and ha[s] relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986); see, e.g., *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Whether "justice and fairness" require the payment of just compensation in a particular case requires consideration of three somewhat overlapping factors, including "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action . . . " *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1986), citing *Kaiser Aetna*, 444 U.S. at 175.

In this case, therefore, the reasons for the South Carolina Coastal Council's prospective restriction, including its precise location and size, on the construction of permanent structures on land within a specified distance of the shore are critical to

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[10] Even amici sympathetic to petitioner's position recognize the fatal flaw in his takings analysis. See, e.g., Amicus Br. Institute for Justice 23 ("Lucas argues that as long as the taking is total, the question of justification need not be considered at all. Yet no balanced theory of takings could be that protective of private property against the legitimate claims of the state.").

the takings analysis. Were, for instance, the Coastal Council's action entrepreneurial in character, that is, simply designed to enhance the economic value of the state's own property, a taking would likely be more readily found. *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124. On the other hand, the mere fact that the state was instead acting pursuant to its police power authority would most certainly not, for that reason alone, avoid any taking issue. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987), citing *Penn Central Transportation Co.*, 438 U.S. at 145 (Rehnquist, J., dissenting). Whether "justice and fairness" required the payment of just compensation for the degree of the impact on the landowner in question would depend on the kinds of concerns being addressed by the police power measure.

To be sure, there is disagreement among members of the Court regarding the precise scope of those governmental police power concerns justifying more serious intrusions. But there has nonetheless been virtual unanimity that there exist certain core police power measures that may justly and fairly impose on a private property owner the most severe of economic impacts, extending even to virtually all market value, when necessary to prevent serious injury to the public. Compare *Keystone Bituminous Coal Assn.*, 480 U.S. at 491, (describing Court's "hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances") with *Id.* at 511 (Rehnquist, C.J., dissenting) ("a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use"). Nor is such unanimity at all surprising, in light of the past precedent of this Court, which has long endorsed that principle. It is likewise reflective of well settled state property law doctrine, which recognizes that private property rights do not extend to the creation of nuisances or otherwise to causing injury to the health and safety of another or to physical harm to nearby properties.

No doubt this Court's most famous articulation of this fundamental principle of property and constitutional law is in

Justice Harlan's opinion for the Court in *Mugler v. Kansas*, 123 U.S. 623 (1887). At issue in *Mugler* was the constitutionality of a state law that, by prohibiting the manufacture and sale of intoxicating liquors, rendered the plaintiff's investment in brewery buildings and machines virtually valueless. Like petitioner here, the plaintiff in *Mugler* argued that such a deprivation was unconstitutional "unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments." *Id.* at 664. The Court squarely rejected that view on the ground that the Constitution "cannot be supposed . . . to impose restraints upon the [state] exercise of their powers for the protection of the safety, health, or morals of the community." *Id.*

According to the Court, "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Id.* at 665. "The power which the States have of prohibiting such use by individuals . . . is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." *Id.* at 669.

The *Mugler* principle, which this Court has since frequently,[11] and recently,[12] reaffirmed, was in accord with settled precedent of the Court at the time. As aptly described by the Solicitor General (Br. 14), "[t]he roots of the [*Mugler*] principles extend deep into the Court's precedents and historical definitions of private property rights, as against the

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[11] See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962); *Miller v. Schoene*, 276 U.S. 272, 280 (1928); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); *Plymouth Coal v. Pennsylvania*, 232 U.S. 531 (1914); *Welch v. Swasey*, 214 U.S. 91 (1909); *Camfield v. United States*, 167 U.S. 518, 522-23 (1897); *Powell v. Pennsylvania*, 127 U.S. 678, 683 (1888).

[12] See *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. at 490.

correlative power of the government to abate nuisances and protect public health and safety from serious harm."[13]

For instance, prior to *Mugler*, the Court had repeatedly upheld the government's right to tear down a structure in order to prevent the spread of fire, without compensating the property owner. See *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362 (1788); *Bowdich v. Boston*, 101 U.S. 16, 18-19 (1879). At the time of the *Mugler* decision, state courts had likewise long endorsed the principles that it announced. See, e.g., *Stuyvesant v. Mayor & City of New York*, 7 Cow. 588, 603-605 (NY 1827); *People v. Hawley*, 3 Mich. 330, 342 (1854); *Kincaid's Appeal*, 66 Pa. St. 411, 423-24 (1870).

No doubt the single most influential, and widely cited, state court ruling was the Massachusetts Supreme Judicial Court decision in *Commonwealth v. Alger*, 61 Mass. 53 (1851).[14] In rejecting a challenge to an ordinance barring construction of wharves on the plaintiff's property – because it was seaward of a harbor line drawn by the government – the court announced the "settled principle . . . that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." *Id.* at 84-85. Anticipating the very argument that petitioner

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[13] There is, accordingly, no merit to petitioner's claim that "[u]ntil this Court's decision in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), a property owner's claim that a federal or state regulation had diminished the value of land did not merit treatment under the Fifth Amendment's takings guarantee. See, e.g., *Andrus v. Allard*, 444 U.S. 51, 67 (1979) (citing pre-*Pennsylvania Coal* regulatory takings cases); *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 144-45 (Rehnquist, J., dissenting) ("there is no 'taking' where a city prohibits the operation of a brickyard within a residential area"), citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

[14] This Court has frequently embraced the Massachusetts court's reasoning in *Alger*. See, e.g., *Patterson v. Kentucky*, 97 U.S. 501, 505 (1878); *Munn v. Illinois*, 94 U.S. 113, 147 (1876).

advances today, almost 150 years later, the court further explained that "although it may diminish the profits of the owner, [it] is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain." *Id.* at 86.

Hence, regardless of its precise scope, the correctness of the basic proposition that a state can validly prevent construction of permanent structures on property where, because of the property's physical characteristics, such construction would create substantial risks of serious injury to public health and safety, cannot be gainsaid. Otherwise, plainly sensible measures such as prohibitions of building on lands prone to floods, mud slides, subsidence or earthquakes, would all constitute unconstitutional takings. Such police power measures cannot properly be understood as somehow "depriving" the landowner of any property rights. The landowner's grievance, if any, is better directed at the physical characteristics of the property and the well-settled principle of tort law barring uses of property injurious to others. See *Rowe v. Town of North Hampton*, 553 A.2d 1331, 1334 (NH 1989) ("The uniqueness of the land, not the financial circumstances of the owner, determines whether a hardship exists.").

Indeed, as explained by the Solicitor General (Br. 11-16), were the rule otherwise, government, as we know it, would be impeded in its everyday efforts to safeguard public health and safety. A government would be unable to order the destruction of an unsafe building, or to prevent profitable activities that pose danger to the surrounding community.[15] The government's ability to declare the unlawfulness of certain food products and drugs would, because such declarations would

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[15] See *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (prohibiting operation of stables in city where they produced "offensive odors" and were "productive of disease"); *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (upholding a statute prohibiting storage of oils in tanks within 300 feet of dwellings, given danger of explosions); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (damage to apple orchards inflicted by diseased cedar trees justified law ordering destruction of cedars).

render existing supplies valueless, be conditioned on the government's willingness to pay their prior market value.[16] The government would even be chilled in its ability to prevent the spread of conflagration when those efforts would require the destruction of structures in the fire's path.[17] And, incredibly, a landowner would presumably possess a constitutional right to mine coal even if "the owner would necessarily unloose poisonous gases." *Pennsylvania-Coal v. Mahon*, 260 U.S. at 418 (Brandeis, J., dissenting).

2. For these reasons, isolated statements in this Court's opinions regarding the need for remaining "economic viability" cannot be read out of context as suggesting that economic impact, standing alone, is dispositive of the takings inquiry.'[18] That result would be flatly inconsistent with repeated and contemporaneous admonitions that takings analysis requires multi-factored inquiry. See page 27, *supra*. No doubt, for this reason, this Court has never applied economic viability as the sole factor in support of its conclusion that an unconstitutional taking has occurred.

Indeed, the proposition that "economic viability" must exist to avoid a takings claims cannot be squared with this Court's repeated rejection, before and since, of that very proposition. See *Keystone Bituminous Coal Co. v.*

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[16] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (no taking although the defendant was prevented from shipping filled milk with its product, which was therefore rendered worthless); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 320-21 (1908) (upholding order to destroy unwholesome food although value might otherwise remain); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) (upholding cremation requirement for garbage, though value might otherwise remain); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (upholding state law prohibiting the manufacture of oleomargarine, and the exclusion of evidence intended to show that because of preexisting investment, a business would be destroyed); *Patterson v. Kentucky*, 97 U.S. 501, 506 (1878) (prohibition of sale of condemned oil). See also U.S. Amicus Br. 12 n.3.

[17] See note 15, *supra*.

[18] See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. at 485; *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987).

DeBenedictis, 480 U.S. at 491-93; *Penn Central Transportation Co.*, 438 U.S. at 131 ("reject[ing] the proposition that diminution in property value, standing alone, can establish a taking"); *Goldblatt v. Hempstead*, 369 U.S. at 590, 594 (1962); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). As it happens, those cases include *Penn Central*, which is the case in which the relevance of "economic viability" was first declared.[19]

The "economic viability" inquiry finds its genesis in a footnote quoting a concession made by the City of New York in *Penn Central*, 438 U.S. at 138 n.36. The city "conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that [Grand Central] Terminal ceases to be 'economically viable,' appellants may obtain relief." *Id.* Of course, placing such dispositive weight on remaining economic viability is far more appropriate in that case than here given the character of the police power concern there at issue (historic preservation). While historic preservation and aesthetic concerns are certainly legitimate and very important bases for police power restrictions on the use of land, it is entirely proper to weigh them less heavily in the takings equation when determining the constitutionality of their economic impact on a landowner, than one might weigh police power measures intended to prevent serious public health and safety risks.

The economic viability inquiry should, for this reason, have its greatest impact in traditional zoning cases where the police power is simply "adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transportation v. City of New York*, 438 U.S. at 124. In those circumstances, the police power measure is distributional in character, with the bottom line being the maximization of

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[19] In *Penn Central*, the Court elaborated on the relationship of the impact of an ordinance to the taking inquiry, suggesting "that a use restriction on real property may constitute a 'taking' * * * perhaps if it has an *unduly harsh* impact upon the owner's use of the property" (438 U.S. at 127 (emphasis added)). Whether an impact is "undue," of course, turns on the reasons for its imposition.

economic value; the fact that one property owner is being deprived of economic value virtually down to zero solely for the benefit of another economic interest would definitely trigger takings concerns. Cf. *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982). But that set of circumstances is a far cry from a case such as this one.

Here, the challenged power measure is not merely distributional in its purpose. It is not just striking a balance between competing economic interests. The challenged law is designed to prevent affirmative injury to public health and safety and to the environment from which comes further protection of public health, safety and welfare concerns. That is, of course, precisely the circumstance when economic impact is not dispositive of the law's constitutionality under the Takings Clause.

3. Hence, the South Carolina Supreme Court correctly rejected petitioner's exclusive contention before that court that the character of the government action could not defeat a takings claim brought against a restriction on the use of property that severely diminished its pre-legislation market value. Because, moreover, petitioner never disputed the contention that the restriction he challenged prevented serious injury to public health and safety and physical damage to neighboring properties, petitioner cannot now claim otherwise. The judgment of the South Carolina Supreme Court, therefore, can, and should, be affirmed on this ground alone.

Should, however, this Court either disagree with the South Carolina Supreme Court's construction of the scope of petitioner's concessions before that court or conclude that petitioner should at this late date be allowed to withdraw those concessions, the proper disposition would be to remand this case back to the South Carolina courts for their reconsideration in light of petitioner's position. The South Carolina courts would then have the opportunity to consider in the first instance: (1) the character of the challenged state restriction on development, including the purposes to be served by its adoption; (2) whether those purposes are in fact implicated in this case; and (3) whether those purposes are sufficiently

weighty to justify the economic impact imposed on petitioner's property.[20] Until that time, however, this Court's review would be premature and would deprive the state court of its prerogative first to consider the merits of petitioner's claims.

III. EVEN ASSUMING THAT PETITIONER IS NOT CONFINED TO HIS CONTENTION BELOW THAT THE ECONOMIC IMPACT OF THE STATE LAW ON HIS PROPERTY COMPELS THE CONCLUSION THAT A "TAKING" OCCURRED, THE SOUTH CAROLINA SUPREME COURT'S DISMISSAL OF HIS CLAIM SHOULD BE AFFIRMED BASED ON THE CHARACTER OF THE GOVERNMENT ACTION, THE UNREASONABLENESS OF PETITIONER'S INVESTMENT-BACKED EXPECTATIONS, AND THE PROPERTY'S REMAINING ECONOMIC USES.

As described above in Part II, respondent contends that the sole issue before this Court is the validity of petitioner's claim that the character and extent of the harm prevented by the Beachfront Management Act are irrelevant to the merits of petitioner's takings claim. The Court should therefore reject petitioner's attempt to inject a new issue in the litigation, by inviting the Court to conduct a more broad-based evaluation of the merits. But even if, contrary to our submission, this Court were to engage in such an inquiry, the judgment of the South Carolina Supreme Court should likewise be affirmed.

This Court has identified three factors as having particular significance in deciding whether a challenged governmental regulation amounts to an unconstitutional taking. These include: (1) "the character of the governmental action"; (2) "its interference with reasonable investment-backed expectations"; and (3) "its economic impact." *PruneYard*

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[20] The court would also have the opportunity to consider whether petitioner's investment-backed expectations were "reasonable" (see page 40, *infra*), and whether the trial court's finding of no remaining market value was clearly erroneous (see note 38, *infra*).

Shopping Center v. Robins, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. Review of these three factors leads to the inescapable conclusion that petitioner's property was not taken.

A. The State's Restriction On The Construction Of Permanent Structures On Petitioner's Property Is The Kind Of Government Measure That May Justifiably Cause A Severe Economic Impact Because It Prevents A Use Of Property That May Cause Serious Injury To Public Health And Safety And Physical Damage To Nearby Properties

As described above (pages 18-27, *supra*), "the nature of the State's action is critical in takings analysis" *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. at 488. Where, moreover, the state action is designed to prevent injury to public health and safety or physical damage to the property of others, the Court has "repeatedly upheld regulations that destroy or adversely affect real property interests." *Id.* at 489 n.18. "The special status of this type of state action can . . . be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Id.* at 491 n.20. Because the Beachfront Management Act is in large part designed to prevent just this type of harm, the "character of the government action" in this case supports dismissal of petitioner's takings claim.

1. The Beachfront Management Act, Like Related Federal Legislation, Is Generally Designed To Prevent Serious Harm To The Public

In order to place the character and purposes of the 1988 Beachfront Management Act in perspective, some background in beach management is necessary. The precipitous decline of coastal environment and resources caused the U.S. Congress to pass the Coastal Zone Management Act of 1972. 16 U.S.C. 1451, et seq. (1988) (CZMA). The statute created a state-

federal partnership designed to assist states in managing their coastal zones.[21] While the 1972 provisions were concerned with a number of coastal problems, the 1980 amendments directed particular attention to the serious issue of continued ill-planned construction along the nation's beaches.[22] These amendments called upon the National Oceanic and Atmospheric Administration (NOAA), the administering agency, to ensure that the beach/dune system was protected but more importantly that the state programs should:

> At the least provide for . . . the management of coastal development to minimize the loss of life and property caused by improper development in flood prone, storm surge, geological hazard, and erosion-prone areas and in areas likely to be affected by or vulnerable to sea level rise, land subsistence and saltwater intrusion, and by the destruction of natural, protective features such as beaches, dunes, wetlands and barrier islands. 16 U.S.C. 1452 (2)(B) (1988)

The amendments also called for preparation of special area management plans for the purpose of protecting significant natural resources, reasonable coastal-dependent economic growth and improved protection of life and property in hazardous areas. 16 U.S.C. § 1452(3) (1988).

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[21] Currently twenty-nine states participate in the program. South Carolina had its program approved in 1979 and has continued its partnership with the federal government since that time.

[22] The House Conference Report reflects Congress' concern with coastal erosion and coastal hazards management. See H.R. Rep. No. 1012, 96th Cong., 2d Sess., reprinted in U.S. Code Cong. and Admin. News 4362, 4387. For example, in discussing the type of policies Congress encouraged the states to adopt, the House Report states that an appropriate enforceable policy for "a barrier island designated as a resource of national significance may be one which requires all development to be a certain distance from the beach in order to allow the island to provide its natural storm protective function." *Id.* at 4391. The House Report further suggests that federal regulations be made consistent with such state management programs noting that it costs the taxpayers 3.3 billion dollars per year (in 1980 dollars) to maintain construction in the nation's floodplains through the national flood insurance programs. See *Id.* at 4399-4400.

In its 1990 Amendments, Congress further addressed the problem of beachfront management by declaring it national policy to plan for global warming (16 U.S.C. 1451[1][1988]-[1990 Supp.]) and directed coastal states to enhance their coastal programs by "preventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high hazard areas . . . " 16 U.S.C. § 1456(a)(2) (1988) (1990 Supp.)

NOAA has directed the states to first consider set-backs or other controls on development to limit the public's exposure to threats from severe storms, erosion and other coastal hazards in order to implement the coastal enhancement objectives. At present there are fourteen states implementing NOAA-approved beach set-back laws and most were developed with federal money made available through the CZMA.[23] South Carolina's 1988 Beachfront Management Act directly responded to the federal government's insistence that states improve their programs by controlling development in hazardous areas. NOAA approved the 1988 Beachfront Management Act Amendments (amending the original 1977 Coastal Zone Management Act) on February 15, 1989, stating that the amendments "still constitute an approvable program and that the procedural requirements of § 306(C) of the Coastal Zone Management Act have been met."[24] Noting that the 1988 Beachfront Management Act specifically addresses the federal concerns about loss of life and property due to improper development along coastal beaches as set out in § 303(2)(B) of the Coastal Zone Management Act, NOAA

[23] Maine, Delaware, Florida, Wisconsin, Rhode Island, Maryland, Alabama, Hawaii, New York, North Carolina, Michigan, New Jersey, South Carolina, Pennsylvania.

[24] Amendment No. 1 to the S. C. Coastal Management Program, Inclusion of the 1988 Beachfront Management Act, Final Findings of Approvability (February 1989).

recognized that South Carolina was directly dealing with a problem facing the nation and many states.[25]

In addition to the CZMA, Congress in 1982 passed the Coastal Barriers Resources Act that had as its purpose the restriction of federal expenditures and assistance that would encourage development of barrier islands. 16 U.S.C. § 3501 (1988). This Act is important to our analysis of the character of the state action because the Isle of Palms is a barrier island. In this important legislation Congress sought to discourage the development of these barrier islands because:

> (3) Coastal barriers serve as natural storm protective buffers and are generally unsuitable for development because they are vulnerable to hurricanes and other storm damage and because natural shoreline recession and movement of unstable sediments undermine man-made structures;
>
> (4) Certain actions and programs of the Federal Government have subsidized permitted development on coastal barriers and the result has been loss of barrier resources, threats to human life, health, property and expenditures of millions of tax dollars each year. 16 U.S.C. § 3501(a)(3),(4) (1988).

The findings and policies of these two federal acts are not based upon abstract conclusions that building on barrier islands like the Isle of Palms is dangerous to life and property and significantly damaging to the fragile beach/dune system. Like the findings and policies of the 1977 Coastal Zone Management Act and its Amendment, the 1988 Beachfront Management Act, these laws are based upon the hard lessons of experience. The impacts and dangers of constructing on barrier islands and near the ocean are well documented.

First, structures and their inhabitants near the ocean have high risk of serious threat due to erosion and storm events.

[25] *Id.* at 7-8; NOAA after careful investigation and public hearings concluded that it did not believe the Act constituted an unjust taking of property, at 7.

This is particularly true on barrier islands.[26] Indeed, Hurricane Hugo provided graphic evidence of the dangerous character of constructing and living on barrier islands.[27]

Secondly, hurricanes and storms cause manmade structures to be broken apart and these parts become projectiles that are carried by wind and wave. These projectiles, in some cases whole houses themselves, are carried onto other properties adjacent to and behind them. This creates significant peril to adjacent and nearby construction.[28]

Thirdly, the sewer lines and septic tanks for near shore homes are often severed or uncovered causing contamination of coastal waters and shellfish beds. Likewise, water lines rupture causing contamination of drinking water.[29] Further, other infrastructure such as roads, bridges and electrical lines are often seriously damaged as well.

Fourth, coastal property debris both on land and that washed into coastal waters hampers cleanup rescue and relief

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[26] Miller, "The Barrier Islands: A Gamble With Time and Nature", *Environment*, 6-9 (November 1981); Stauble, "Barrier Islands: Dynamic Coastal Landform Requiring Complex Management Decisions," *Barrier Islands: Process and Management* (1989) 63; National Research Council, "Managing Coastal Erosion" (1990) National Academy Press, 20; Neal and Pilkey, *Living with the S.C. Shore* (1984) Duke Univ. Press, 3-70, 93-94.

[27] Thieler and Young, "Quantitative Evaluation of Coastal Geomorphological Changes in S.C. After Hurricane Hugo. *Journal of Coastal Research*, Special Issue No. 8. (Spring 1991); Wang, "Water & Erosion Damage to Coastal Structures – S.C. Coast, Lessons of Hurricane Hugo" *Proceedings of the 1990 National Conference on Beach Preservation Technology* (February 1990); Stauble "Effects of Hurricane Hugo on the S.C. Coast," *Journal of Coastal Research*, Special Issue (Spring 1991).

[28] Katuna, "The Effects of Hurricane Hugo on Isle of Palms, S.C.: From Destruction to Recovery." *Journal of Coastal Research*, Special Issue No. 8 (Spring 1991); Coch and Woff, "Effects of Hurricane Hugo Storm Surge in Coastal South Carolina." *Journal of Coastal Research*, Special Issue No. 8 (Spring 1991).

[29] Cook, "Hurricane Hugo v. Critical Lifelines: Lessons Learned and Implications for the Future: *Hurricane Hugo One Year After*, (B. Sill and P. Sparks, Eds., 1990).

efforts. Evacuating individuals and rescue workers must contend with downed power lines and dangerous debris during their efforts in protecting life and property.[30]

Fifth, aside from the immediate harm that near shore construction can cause during erosion and storm events, the costs of cleanup, building emergency dunes, and sand nourishment associated with storms is significant.[31]

Finally, permanent construction, as that proposed by petitioner, close to the beach/dune system causes serious disruption to the equilibrium between sand and water. Even slight alterations to the beach/dune system can lead to significant disruption of the stability of the beach and exacerbate erosion. Near shore construction that affects this sensitive system soon becomes threatened and directly threatens their neighbors.[32]

Development on barrier islands such as the Isle of Palms magnifies the foregoing problems because their shorelines are generally unstable. As noted in the Coastal Barrier Resource Act of 1982, coastal barrier islands are clearly the most dangerous areas along the coast to build:

> Beaches, dunes, and entire islands erode and migrate as ocean currents, wind and waves undermine and move them. Storms can wipe out whole sections of beach when they are overwashed and can just as easily close inlets as sediments are redeposited. The sands of beaches continuously move and are redistributed. In response to a rising sea level (about one foot per century along the

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[30] *Id.*

[31] Rhodes, "Federal Emergency Work on S.C. Beaches Following Hurricane Hugo," *Beaches: Lessons of Hurricane Hugo* (1990)

[32] Clark, *Coastal Ecosystem Management: A Technical Manual for the Conservation of Coastal Zone Resources*, and other National Conservation groups, P. 318, 336, 566; Report of Barrier Island Work Group, U.S. Dept. of Interior (1978) pp. 16-17; Neal and Pilkey, *Living with the S.C. Shore* (1984) pp. 21-54 – For a more in depth look at issues raised in N. 26-32 see the Amicus Brief of Nueches County Texas, NRDC, *et al.*

> Atlantic Coast), these islands are generally migrating landward. The combination of erosion and migration, as well as the effects of flooding from hurricanes and other storms, make these areas especially hazardous places for permanent man-made structures and human habitation. S. Rep. No. 419, 97th Cong. 2d Sess. 1 (1982).

It is in this context that the state of South Carolina sought to amend its 1977 Coastal Zone Management Act. While the 1977 Coastal Management Act had as its purpose the protection of the beach/dune system and prevention of ill-planned development, it failed significantly in its ability to prevent such development from encroaching dangerously near the ocean. Construction could take place up to the trough of the primary oceanfront sand dune and where there was no such dune, landowners built literally up to the highest uprush of the waves where there was no vegetation. S.C. Code Ann. § 48-39-10(H) and (I). In 1986, the respondent appointed a Blue Ribbon Committee on Beachfront Management to investigate the problems of beach erosion and propose management solutions. During the deliberations of the committee several minor storms wreaked havoc upon the "Grand Strand" beaches of the state and brought home the extreme urgency of improving beach management. The committee, after noting the damage that the storms had caused, then proposed that the state should require retreat of existing structures from the shoreline over a thirty year period, limitation of new construction, particularly erosion control structures, and encouraged the state to develop a nourishment plan to provide sand to critically eroding beaches. (Report of S.C. Blue Ribbon Committee on Beachfront Management.)

The 1988 Beachfront Management Act expanded upon the Blue Ribbon recommendations but the same theme underlies the Act. The Act seeks to prevent ill-planned development near the shore. The legislature found that the 1977 Act "did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system." Continuing, the findings state:

> Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and the private interests to protect the system from this unwise development. S.C. Code Ann. § 48-39-250(4).

The 1988 Beachfront Management Act sought to prevent this beach management problem by retreat of existing structures over a forty year period, strict prohibitions on construction in high hazard areas and promotion of long-range planning and nourishment. *Id.* § 48-39-260. The South Carolina Supreme Court gave deference to the findings and policies of the Beachfront Management Act and the petitioner agreed with the importance of the Act. Therefore, it must be assumed that the construction proposed by petitioner represents "unwise development" that will jeopardize the stability of the beach/dune system, accelerate erosion and endanger adjacent property. *Id.* § 48-39-250(4). Limiting this unwise development prevents *misuse* of a fragile ecosystem that serves to contribute to shoreline stability and is unsuited in its natural state for construction.

2. Application Of The Act's Ban On The Construction of Permanent Structures On Petitioner's Property Prevents Serious Injury To Public Health And Safety And Physical Damage To Neighboring Properties

The evidence presented at trial graphically demonstrated that the construction of permanent structures on petitioner's property is the type of "ill-planned" development that the federal laws and the 1988 Beachfront Management Act seek to prevent because of the associated public harms.

According to the methodology utilized by the Act under section 48-39-280, the east end of Isle of Palms, including the two petitioner lots, is characterized as an unstabilized inlet zone. Tr. 72, Stip. No. 14. Within this zone the baseline is located at the most landward shoreline in the past forty years.

Tr. 79-80. Construction of habitable structures from a point twenty feet behind the baseline seaward to the ocean is prohibited. In the case of the two petitioner lots, the baseline fell on the road behind the lots and thus by statute, neither lot was deemed suitable for residential development. S.C. Code Ann § 48-39-250(4).

This location of the baseline and the conclusion that the area is unsuitable for building was supported by the shoreline change maps presented. (Exhibits 10-22) While the east end of this barrier island is generally accretional, the shoreline is subject to significant episodes of erosion and the shoreline has fluctuated greatly during the past forty years. Tr. 72-78. The two lots in question were entirely underwater in 1963, and as recently as 1973 the shoreline was even further landward and in fact, a pond formed over the two lots. See Exhibit 22, J. App. 9. Exhibit 22 shows the various shorelines that have developed along the petitioner's subdivision and conclusively shows the volatile and dangerous nature of the beach at Wild Dunes.

The volatility of the area is further demonstrated by the fact that during the 1980s the City of Isle of Palms and the Council granted permission to Wild Dunes to scrape sand and use sandbags to protect structures threatened by erosion. Tr. 98-101. In a further effort to protect against erosion, Wild Dunes received a permit for construction of a revetment to protect portions of the development. Tr. 101. Finally, in 1987, the development obtained a permit to renourish the beach with sand in order to protect the structures built during the late 1970s and 1980s. Tr. 101.

In spite of the forgoing efforts, the testimony is unrebutted that the area in question is still subject to severe erosion and further remedial action will be necessary to protect the structures along the front beach. Tr. 85. Further, the evidence conclusively shows that houses and other structures along the east end of the Isle of Palms will continue to be threatened in the future by erosion and storm events. Tr. 88. Indeed, this testimony was a prophetic statement of the damage wreaked by Hurricane Hugo shortly after this trial. See 31-33, *supra*.

The forgoing analysis is important because the petitioner seeks to characterize the purposes of the Act as promoting tourism and the state's economy. Pet. 38-41. While this is one of the incidental benefits, including recreation and habitat for flora and

fauna, the purpose of the Act is primarily directed at prevention of physical damage to the beach/dune system and prevention of public health and safety risks created by ill-planned development.

Consistent with his litigating strategy, the petitioner never made a serious effort to rebut the fact that this area was an unsafe area to build upon. He failed to challenge the location of the baseline pursuant to the administrative and judicial appeal provisions of the Act thereby conceding that the area was subject to serious bouts with erosion. Further, his own expert acknowledged the fact that the habitable structures in Wild Dunes were subject to serious threat of erosion in the mid 1980s. Tr. 20-21. Having failed to take the opportunity to avail himself of the administrative remedy, he should not be allowed to collaterally attack the facts to which he bound himself. See, e.g., *Callanan Road Co. v. United States*, 345 U.S. 507, 512-13 (1953) ("A direct attack in such circumstances was the remedy. . . . . [Appellant] cannot in this collateral proceeding attack the validity of the Commission's order . . . "); see generally *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 36 (1952); *McKart v. United States*, 395 U.S. 185, 193 (1969); Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L. J. 817, 859-870 (1976)[33]

3. The Kinds Of Harms Addressed By The Act Are Akin To Those That This Court Has Long Held May Adversely Affect And Even Virtually Destroy Property's Market Value Without Being An Unconstitutional Taking.

Contrary to the petitioner's claim and moreover, as supported by the forgoing discussion in Part IIB (page 18, *supra*), the kind of harms that the Beachfront Management Act seeks to prevent are those that can defeat a takings claim even where there has been a virtual destruction of the economic value of a piece of property. The purposes of the Act and its application to petitioner's property

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[33] Were the rule otherwise, a litigant could, as petitioner attempts to do here, avoid limiting judicial review of an agency determination to the record before the agency. By filing a lawsuit, the party would circumvent the normal process of administrative appeal, followed by judicial review based on the agency record, and instead obtain a court's *de novo* review of the agency decision.

implicate the core police power concerns that this Court in *Mugler* and its progeny and state courts since *Commonwealth v. Alger*, have long recognized cannot be validly deemed to "take" property when they merely prevent its injurious use.

Perhaps most significantly, the kinds of risks redressed by the Act are quite analogous to risks that historically have been enjoinable at common law as nuisances and when realized, been the basis of successful damage actions sounding in tort.[34]

Thus courts have declared that a landowner may not prevent surface waters from naturally entering his property where the effect of that physical impediment is to redirect those waters to neighboring properties where physical harms result. *Cox v. Cambridge Square Towne Houses*, 236 S.E.2d 73 (GA 1977); *Hurdman v. North Eastern Railway Co.*, L.R. 3 CPD 168 (CT App. 1878) And

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[34] This is not to suggest, of course, that an activity must be precisely equivalent to a traditional common law nuisance to defeat a takings claim brought against a law of general applicability. The reasons why were well explained by Chief Justice Shaw in *Commonwealth v. Alger*:

> The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide water is a nuisance at common law or not. . . . It is this consideration, (the expediency and necessity of defining and securing the rights of the public,) which creates the exigency, and furnishes the legislature with the authority to make a general and precise law. . . .

61 Mass. at 104; see *id.* at 96-97 ("The tradesman needs to know, before incurring expense, how near he may build his works without violating the law or committing a nuisance . . . ").

It is, of course, also equally true that police power measures that are not intended to redress nuisance-like activities may nonetheless not be deemed takings based on consideration of this Court's three-factor inquiry. See, *e.g.*, *Penn Central Transportation Co. v. City of New York* and *Keystone Bituminous Coal Co. v. DeBenedictis*.

See as well, *Camfield v. United States*, 167 U.S. at 523 ("ever since *Aldred's Case*, 9 Coke 57, it has been the settled law of the country and of England, that a man has no right to maintain a structure upon his land which . . . renders the occupancy of adjoining properties dangerous, intolerable, or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property.")

in those cases where the landowner has nonetheless done so and harms resulted, the courts have awarded damages. *Tetherington v. St. Louis T.E.R. Co.*, 80 N.E. 697 (1907); *Braverman v. Eicher*, 238 N.W. 2d 331 (1976); *Cox v. Cambridge Square Town Houses Inc.*, *supra*.

Courts have similarly ruled that actions on a landowner's own property that have, due to the dynamic nature of the soil in the area, caused subsidence on neighboring property may amount to an actionable nuisance. (*Knapp v. Ciricco*, 133 N.Y. Supp.2d 356 (1954); *Friendship Dev. Co. v. Smith-Southwest Industries, Inc.*, 576 S.W. 2d 21 (1978); *Henderson v. Wade Sand & Gravel Co. Inc.*, 888 So.2d. 900 (1980). Landowners have also been barred from and ordered to pay damages for disposing of pollutants in a manner that harms neighboring property. *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (1982); *Wood v. Picillo*, 43 A.2d 1244 (1982). There are not surprisingly even cases where the landowners have been barred (or required to pay damages) under a nuisance theory for constructing erosion control devices because of the resulting harm to adjacent property owners. *Lummis v. Lilly*, 429 N.E. 2d 1146 (1982)[35]

Importantly, in none of these instances, is there a defense that the activities creating such threats are confined to the defendant's property in the first instance. That fact merely

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[35] Although filing in support of petitioner, the amicus brief prepared by Professor Richard Epstein on behalf of the Institute for Justice, recognized this common law limitation. See Amicus Br. Institute for Justice 21 ("The normal ebb and flow of the tides are allowed to do their work. The construction of massive bulwarks on the beach will starve it of new sand and cause material physical damages to the beach and its long term health."). Having properly acknowledged the scope of the common law tort limitations on property rights, however, amicus offers no more than its own ipse dixit as to why it is ready to second guess respondent's technical determination that the construction of permanent structures in that same area may cause similar harm. The analogy to common law nuisance plainly does not depend on whether the structure to be built is the same that might have been built hundreds of years ago. It instead depends on the kind of injury and the causal mechanism for its creation.

prevents the activities from amounting to a physical trespass and certainly does not mean that no nuisance has occurred.

B. Any Investment-Backed Expectations Of Petitioner's That Are Adversely Affected By The Development Restriction Were Not Reasonable In Nature

A second factor that the Court looks to in determining if a police power restriction on the use of private property equates to a taking is whether the regulation interferes with reasonable investment-backed expectations. (*Keystone Bituminous*, 480 U.S. at 495, citing *Kaiser Aetna*, 444 U. S. 164, 175 (1979); see page 27, *supra*). If the right to realize the most profitable use of one's property or to build on one's property were absolute, compensation would be required in every case. Similarly, if the "reasonableness" of a property owner's expectation was based upon his investment of large sums of money, by doing so he could effectively insulate an injurious use of his property from regulation. As discussed below, petitioner had no "reasonable" investment-backed expectations.

1. Whether the petitioner's investment-backed expectations are reasonable is closely linked to the character of the governmental action. Here, the government action seeks to prevent construction that has serious public health and safety implications (see pages 28-37, *supra*). The common sense notion that property owners can have no reasonable expectation to use or develop their property in a manner that will cause such harm to others is effectively compelled by this Court's decision in *Mugler* and the long line of cases both before and since that have held that such police power measures do not "take" property, within the meaning of the Takings Clause. See *Keystone Bituminous*, 480 U.S. at 491-93.

Two more recent decisions of this Court, in particular, undermine the reasonableness of any investment-backed expectations that petitioner might claim. In *Ruckelshaus v. Monsanto*, this Court held that "absent an express promise" from the government, "Monsanto had no reasonable investment-backed expectations that its [trade secret] information would remain inviolate in the hands of EPA." 467 U.S. 986, 1008 (1984). This was so, according to the Court, although EPA had no practice of disclosing that information to others at the time that Monsanto submitted its trade secret information to EPA and "neither [the Federal Insecticide Fungicide, Rodenticide Act] nor any other provision of law gave EPA authority to disclose data obtained from Monsanto" at the time of its submission to the agency. *Id.* By contrast, because the Court found that Monsanto had during a subsequent time period (between October 22, 1972, and September 30, 1978) submitted additional trade secret information based on explicit statutory guarantees of its nondisclosure, the Court concluded that the application to those submissions of the subsequently-enacted federal statutory requirement of disclosure would amount to an unconstitutional taking in the absence of "just compensation." See *Id.* at 1010-1013.

Contrary to petitioner's apparent assumption, the mere purchase of property under an existing zoning ordinance provides no analogous guarantee. The existing law simply announces the lawfulness of current practices. It offers no guarantee that the law will not need to change in the future. Hence, only when, unlike in this case, the landowner has further invested in the property and expended substantial sums to develop it consistent with existing land use ordinances, does the takings clause further restrict the state's ability to apply any subsequent changes in the ordinances retroactively to those pre-existing uses.[36] And where, as here, there was neither an explicit governmental guarantee of no change in policy nor further investment by petitioner to develop the land consistent with the law existing at the time

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[36] That is also the very reason why petitioner's further complaint here regarding the existence of other homes on similarly situated adjacent lots is wholly misguided. Those homes predated the enactment of the 1988 law. The distinction about which petitioner complains, therefore, is precisely the one supported by the Constitution. That is not, of course, to suggest that police power measures can never restrict existing uses, but that issue is not presented in this case. See generally, Noel, Retroactive Zoning and Nuisances, 41 COLUM. L. REV. 457 (1941).

of purchase, petitioner's expectations that the law would not change were not reasonable.

As explained by the Court in *Monsanto*, this is especially so in an area, like coastal zone protection, "that has long been the focus of great public concern and significant government regulation." *Id.* at 1008-09. The expectancy reasoning of *Monsanto* should be applied here because regulation of land use, like pesticide use, is a legitimate subject for government regulation to prevent injury to the public. Great harm could be derived by uncontrolled use of either. Further, loss of government largesse can be equally devastating to the property owner as those who own real property. In the final analysis, there is no inherent difference in the social impacts or private impacts implicated by the regulation of either type of property interest.

This Court's more recent decision in *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986), likewise suggests the unreasonableness of petitioner's investment-backed expectations. There, the Court rejected a takings claim by employers based upon a governmental requirement that the company had to make payments to pension plans when withdrawing from the plan. The Court concluded that no taking had occurred despite the fact that it upset otherwise settled expectations. *Id.* at 223. As with other economic property cases, the Court found that it merely adjusted the benefits and burdens of economic life so as to promote the common good rather than physically invading or permanently appropriating the assets. *Id.* at 225. The Court stated that "[o]ur cases are clear that legislation that readjusts rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Id.* at 223. And, of particular pertinence to this case, the Court stressed that " '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by *subsequent amendments* to achieve the legislative end.' " *Id.* at 227, quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) (emphasis supplied).

2. The record in this case, moreover, leaves no doubt that petitioner's investment-backed expectations were unreasonable. Petitioner purchased the property in December 1986,

and had been intimately associated with the property in the early 1980s in his capacity as a contractor for the development in that area. Tr. 34-40. He was, as a result, "very knowledgeable" about the property that he purchased. Tr. 37. Petitioner therefore had no reasonable investment-backed expectation that no restrictions would be placed on his building upon his property. His property is located in an area marked by shifting sands and thus subject to ongoing serious threats of erosion.

At trial, petitioner acknowledged that he knew that the property had suffered episodic erosion in the 1980s. Tr. 52-53. He sold lots, and was intimately involved in the affairs of Wild Dunes during the severe erosion periods between 1983 and 1987. His engineer acknowledged erosion was a problem and certainly the remedial efforts of scraping sand, using sandbags, building revetments and renourishing shows the seriousness of the problem. Petitioner also had reason to know prior to his purchase that this kind of property was subject to strict governmental regulation. The 1977 South Carolina Management Act, while less strict then the subsequently-enacted 1988 Act, certainly placed prospective property owners on notice of the nature of the harms of development adjacent to the shoreline and the potential for future restrictions. In fact, respondent appointed a Blue Ribbon Committee on Beachfront Management to investigate the problems of beach erosion and propose management solutions in 1986, prior to petitioner's purchase in December of that same year. The South Carolina Legislature enacted the 1988 Act that petitioner challenges approximately nineteen months after his purchase.

Petitioner also had reason to know at the time of purchase that the government could validly restrict uses of land that, because of their unique physical characteristics, threatened to cause physical injury to others. Two years prior to petitioner's purchase and at a time when petitioner was actively involved in developing coastal properties, the South Carolina Supreme Court in *Carter v. South Carolina Coastal Council*, 314 S.E. 2d 327 (SC 1984), recognized the unique physical characteristics of wetlands and concluded on that

basis that there was no compensable taking of private property where the state refused to allow traditional filling of saltwater marsh. *Id.* at 329. The parallel is clear. Petitioner's property, like that at issue in *Carter*, is unsuited in its natural state for the construction of certain structures. In each context, such construction threatens to cause physical harm to others and to their property.[37]

3. Finally, various environmental decisions that have been made by state courts offer a clue as to the justified expectations of the petitioner. There has developed a clear judicial recognition that certain types of real property are of such a natural character that there is no reasonable investment-backed expectation that can exist for development. (See cases cited in N. 37, *supra.*) This means of course that such property is held by the owner with the implied obligation that it not be used in a way that is inconsistent with its natural state or harms others. The leading case recognizing this principle is *Just v. Marinette County.*

In the *Just* case, Marinette County passed a shoreline zoning ordinance that required that the Justs obtain a conditional use permit to fill certain wetlands that they owned. The owners alleged that the prohibition on filling wetlands was an unconstitutional taking. The Court, in rejecting this limitless expectation on the part of the property owner to use his property, made the now classic statement:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it is unsuited in its natural state and which injures the rights of others. . . .

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[37] The South Carolina Supreme Court is not alone in its reasoning, which has been embraced by many state supreme courts faced with a comparable takings challenge. See, e.g., *Just v. Marinette County,* 201 N.W. 2d 721 (U.S.C. 1972); *Orion Corporation v. State,* 747 P. 2d 1062 (1987); *Rowe v. Town of North Hampton,* 553 A. 2d 1331 (N.H. 1989); *Presbytery v. King County,* 787 P. 2d 907 (Wash. 1990) cert. denied, 111 S. Ct. 284, 112 L. Ed. 2d 238 (1990).

> . . . The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land . . . (at 768)

In *Carter v. South Carolina Coastal Council,* 314 S.E. 2d 327 (SC 1984), the South Carolina Supreme Court adopted this principle and denied that there was a compensable taking of private property where the state refused to allow traditional filling of saltwater marsh. *Id.* at 329. Just as there can be no justified expectation to build on marsh land unsuited in its natural state for construction of a home, there has now developed a conscious social awareness that certain beachfront property in many instances is unsuitable in its natural state for construction. Given the facts of this case, petitioner had no *reasonable* investment-backed expectation that he should be allowed to build upon his property. Since he has not challenged the location of the baseline and conceded the general fragility of the area in question, he can not argue that his expectation to build is reasonable any more than a person can now claim it is reasonable to build on marsh. See *Presbytery v. King County,* 787 P.2d 907 (Wash. 1990), cert. denied, 111 S. Ct. 284, 112 L. Ed. 2d 238 (1990). (Where a County Ordinance prohibited all construction on several wetland lots on the Plaintiff's land. The Presbytery Court observed that if a regulation protects the public from harm, does not infringe upon the right of the land owner to possess, exclude others, and dispose of the property, no taking has occurred.)

4. In view of the *Mugler* line of cases including its most recent reaffirmance in *Keystone,* the principles set forth in *Monsanto* and *Connolly,* petitioner's knowledge of erosion and failure to challenge the location of the baseline, together with the assumed unsuitability of the beach for construction, petitioner has no justified expectation to build on these lots.

C. Petitioner's Property Retains Substantial Economic Value Notwithstanding The 1988 Act's Bar On The Construction Of Permanent Structures

The final factor in a proper takings analysis is the extent of the reduction in the economic value of petitioner's

property. While the trial court found the property to be worthless, that finding was not reviewed by the S.C. Supreme Court. Respondent also believes that such a finding was not necessary given petitioner's litigation theory, but if this Court deems reduction in value is relevant, the case must be remanded to the S.C. courts for further proceedings on that issue.[38] However, it remains evident that the beachfront lots retain substantial value and use and that, under established precedents, no taking of petitioner's property has occurred.

This Court has repeatedly recognized the multifaceted concept of property ownership in its frequent references to the full "bundle" of property rights. (See, e.g., *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-131 (1978); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), see also, Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation Law'," 80 Harvard L. Rev. 1165, 1230-1233 (1967).) The Court's takings jurisprudence has consistently reflected the principle that government's denial of but one "strand" of the

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[38] The trial court's purported finding that the 1988 Act deprived petitioner's property of all economic value is not binding on this Court. That finding was based on the erroneous legal proposition that the value of the property necessarily depended on its being utilized for the most intensive use reasonably possible (i.e., residential development). See App. 37. Neither petitioner's appraiser nor the trial court therefore took into account the market value of the property for other, albeit less profitable, uses of the parcels.

In any event, the South Carolina Supreme Court should in the first instance have the opportunity to review the merits of the trial court's finding on economic value. For the reasons previously described (see pp. 12-27, *supra*, that court had no need to review the finding of value because it was required only to consider petitioner's threshold contention that the character of the governmental action was irrelevant to the proceedings. Had petitioner contested the character of the restriction, the South Carolina Supreme Court might well have had reason to review the trial court's finding regarding economic impact. We believe that the state supreme court would likely have concluded that the trial court's finding was clearly erroneous based on the record before it. But in no event should this Court itself make a final determination that a taking occurred, based on that trial court finding, without first providing the state supreme court a meaningful opportunity to review the economic impact finding for itself.

bundle does not rise to the level of a compensable taking. This is because the aggregate property interest must be viewed in its entirety. (E.g., *Andrus v. Allard, supra*, 444 U.S. at 65; *Penn Central, supra*, 438 U.S. at 131; *U.S. v. Twin City Power Co.*, 350 U.S. 222, 227-228 (1956).

This analytical framework is dispositive here in light of the dual facts that: (1) petitioner has not lost the use of his property; and (2) the economic impact of the 1988 Act has consequently and necessarily been to result in a less than total diminution in value.

1. Turning to the first point, petitioner offered no evidence below that all use of his property was denied as a result of the 1988 Beachfront Management Act. Nor could he. Under the statute, petitioner retains exclusive physical access to the property, which abuts the publicly-owned tidelands. He retains the right to exclude others, the right to make passive and recreational use of the parcels and the right to alienate the property. The record below reflects these opportunities. Tr. 97-98.

To be sure, the parcels would be worth more if permanent, habitable structures were allowed upon them.[39] But even with the 1988 Act's restrictions, the property remains extremely valuable for purposes short of permanent, residential development.

For example, a substantial economic value would attach to such rights in conjunction with ownership of an adjacent parcel (e.g., landward of the setback line) on which the owner could build a dwelling. The owner of such an adjacent parcel would place significant economic value on ownership of the lot closer to the shore, notwithstanding the setback requirement.[40] This is because ownership of that additional parcel would enhance the value of the whole by adding significantly

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[39] As discussed at pp. 8-12, *supra*, the possibility of that opportunity now exists – by virtue of the 1990 amendments to the Act.

[40] An economically viable "use" necessarily includes the ability to sell property to a third person who is willing to purchase that property because of its value to him or her. See *Andrus v. Allard*, 444 U.S. at 64. Were the rule otherwise, the takings inquiry would turn on the subjective vagaries and objectives of the particular owner rather than the market's ability to dictate objectively-viable uses.

to the privacy, serenity and exclusivity of the aggregate area. Indeed, it was just such attributes that rendered so valuable the beachfront at issue in *Nollan v. California Coastal Commission*, 483 U.S. 843 (1987), and made the requirement of public access to it an unconstitutional taking. Certainly the Court in *Nollan* never doubted the significant economic value of the discrete segment of beachfront property lying between the Nollan's home and the shore, notwithstanding the fact that there were no permanent structures on it or, presumably, permitted to be built on it.[41]

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[41] Petitioner's circumstances are very similar to that of the property owners in *Andrus v. Allard*. In that case, federal law denied the owners of certain avian artifacts, the right to sell and earn a profit from those items. Noting that the regulations challenged did not compel the surrender of the artifacts, and that there was no physical invasion or non-commercial restraint upon them, the Court stated "the denial of one's traditional property rights does not always amount to a taking." 444 U.S. at 66. Like in this case, the property owners in *Allard* were denied the opportunity to use their property in a way which would maximize the property's economic value: "It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive." 444 U.S. at 67. Faced with a diminution in value and loss of the use in *Allard* at least as significant from a percentage standpoint as in the present case, the Court rejected the takings challenge, justifying the severe restriction by stating: "It is true that the appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure 'the advantage of living and doing business in the civilized community.' " 444 U.S. at 67 quoting from *Pennsylvania Coal Co v. Mahon*, 260 U.S. 393, 422 (1922).

The instant case is also closely analogous to that of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 258 Cal. Rpt. 893 (Cal. App Dist. 1989). On remand from this Court, the California Court of Appeal recognized the fact that the most intensive commercial use of property is not the *only* use to be considered under the Takings Clause. Determining that the land use ordinance in question did not deny the landowner all use of his property despite the fact that it could not reconstruct permanent structures demolished during a flood, the court concluded that "as far as this ordinance is concerned, many camping activities could continue on this property. Meals could be cooked, games played, lessons given, tents pitched." *Id.* at 902.

2. Given the substantiality of the uses remaining to petitioner under the 1988 Act, petitioner's claim that his property lacks positive market value is simply incredible. At trial, petitioner steadfastly ignored the possibility that the property might have some use other than for the construction of permanent residences. His entire case was predicated upon a market analysis based exclusively upon use of the property for the construction of single family homes.[42] He failed to consider the suitability of the property for the less-intensive uses described above, which provide the property with substantial market value (see, e.g., Tr. 117, 122).

Of course, petitioner's use or sale of the property for such purposes would yield economic benefits significantly less than those of the lots if residential construction were permitted. However, the Court has often observed that " '[a]lthough a comparison of values before and after' a regulatory action is relevant, . . . it is by no means conclusive . . . " *Keystone, supra*, 480 U.S. 470, 490, citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). The Takings Clause does not guarantee owners of private property that regulations will not reduce the value or eliminate the most valuable use. *U.S. v. Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1 (1981); *Andrus v. Allard*, 444 U.S. at 66; *Goldblatt v. Town of Hempstead*, 369 U.S. at 592. Nor does the Constitution guarantee a profitable use, when that profit would be realized by imposing risks to public health and safety, or creating physical injury to other person's properties.

Applying these principles to the present case, petitioner has not been deprived of all economic use of his property. First, there has been no total loss of use of the property at issue; rather, only one aspect of one strand of petitioner's "bundle of rights" has been affected. Second (and as a corollary of the fact that petitioner retains substantial uses of his property), the economic value of petitioner's property has not been eliminated. But, in any event, even assuming that the

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[42] Petitioner's appraiser testified at trial that he had not investigated any possible property value other than that related to construction of single family homes on the property. Tr. 54-55.

market value of petitioner's property has been severely eroded, no taking has occurred because those more profitable uses would have threatened public health and safety as well as the physical integrity of the property of others.

CONCLUSION

The petition should be dismissed as improvidently granted or the case should be remanded for further proceedings below to allow the state courts to consider petitioner's temporary takings claim in the first instance and to allow petitioner to apply for relief under the 1990 Amendments. Alternatively, the judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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